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July 9, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket No. 01-338

Dear Ms. Dortch:

Attached is a letter from Herschel Abbott, Vice President - Government Affairs, BellSouth, to Chairman Michael Powell concerning steps the Commission should take to ensure a speedy transition to a regime of legitimate unbundling.

Pursuant to the Commission's rules, please include a copy of this notice and attachment in the record of the proceeding identified above. Thank you.

Sincerely,

Jonathan Banks

JB:kjw

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July 9, 2004

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20054

Re: Transition to Legitimate Unbundling

Dear Chairman Powell:

With the Commission's decision not seek an appeal of the TRO, it is time to focus on establishing healthy wholesale relationships in the local wireline industry. The industry has operated for eight years under unlawful schemes to artificially subsidize local competition. The biggest subsidies have gone to the biggest interexchange carriers, both of which chose a strategy of subsidized access over investing in their own facilities or using their own existing switching. This unfortunate history has left the industry embroiled in litigation for the past eight years. This is particularly unfortunate because the wireline industry is now just one segment of a broad, competitive communications market. Cable telephony, wireless substitution for minutes and lines, and VoIP guarantee consumer choice and competitive communication services.[1] At this point, extending discredited regulations that require breaking apart wireline networks (but not other competing networks) into piece parts at below-cost prices makes little economic sense. Such regulations no more serve consumers than had the price of buggy whips been regulated one hundred years ago when car factories were springing up across the country.

Although moving away from dependence on these subsidies will be difficult for those who have staked their business plans on them, a successful transition will create the climate for sustained, healthy communications competition and for the substantial investments necessary to upgrade the wireline network to meet our country's broadband

[1] AT&T's switch to increasing reliance on VoIP and wireless illustrates the availability of competitive alternatives, and highlights just how numerous and effective these alternatives are. "Nevertheless, AT&T's rivals have continued to cut prices, [said an AT&T spokesman]. 'These competitors have done the unthinkable: cut prices even further.' Their actions ... are unsustainable amid what AT&T views as an industry with too many competitors." Dow Jones Newswires, June 23, 2004

objectives. Such a transition is not only possible but is already occurring for both carriers and consumers. BellSouth has signed over a dozen commercial agreements that provide local competitors wholesale access to our network at mutually agreeable prices. BellSouth has every incentive to continue to market its network on a wholesale basis due to competition from facilities-based carriers and VoIP providers. And, as many communications analysts have recognized, subsidized UNEs are not the drivers of consumer prices, and moving to rational wholesale prices will not affect consumer prices. "We do not expect a rise in the RBOCs' retail rates as UNE-P is phased out, given the threat of market share losses to wireless and cable competition."[2] In the words of another analyst, "the pricing for local telephony services are more directly related to prices for the near perfect substitutes in the market place today (such as mobile phones and increasingly voice-over-IP solutions), and not the size of the gross margin a particular UNE-P reseller can earn."[3]

The Commission can best ensure that the industry moves forward by improving the foundation for continued commercial solutions and ensuring that the D.C. Circuit's decision is quickly implemented through new rules and updated interconnection agreements. The Commission's recent decision on pick-and-choose is a step in the right direction with respect to agreements negotiated under section 252. An essential step to make commercial negotiations more likely to bear fruit would be to grant the BellSouth and SBC petitions that seek to streamline regulatory review of wholesale network agreements.[4]

What the Commission should not do is enter an order preserving the latest unlawful UNE regime, as some have urged. Such an order would be counterproductive to the commercial wholesale arrangements the Commission is otherwise seeking to encourage. In particular, at least some will seek to use such an order to bring to a standstill the contractual change of law process initiated as a result of the D.C. Circuit's mandate, which would undermine any progress over the next several months towards reaching commercial solutions. A Commission order perpetuating a UNE regime that has been rejected by the courts on three separate occasions is more likely to set the wireline industry back than move it forward, and given current levels of competition, very unlikely to serve any useful purpose for consumers.

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[2] CIBC World Markets, Daily Datatimes, June 10, 2004, at 2.

[3] Fulcrum Global Partners, Wireline Communications, June 10, 2004 at 2. See also, Goldman Sachs, Telecom Services, June 10, 2004 at 2 ("Unfortunately for Bells, the rantings of consumer groups and other UNE-P supporters about the death of local competition are baseless, as wireless and VoIP provide permanent long term competition"); Merrill Lynch, Regulatory Update, June 10, 2004 at 2("we would continue to argue that the consequences of the 1996 Telecom Act and the recent ruling by the D.C. Circuit Court with respect to local competition are, in our view, becoming increasingly less relevant over time as the mid-1990s competitive and technological framework for the Act is being superceded at a rapid pace").

[4] *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, filed July 1, 2004; SBC *Communications Emergency Petition for Declaratory Ruling, Preemption and for Standstill Order to Preserve the Viability of Commercial Negotiations*, filed May 3, 2004.

Twice before, the Commission's UNE rules have been vacated by the courts. Each time, BellSouth and the other Bell companies took positive steps to maintain order in the industry at substantial cost to these companies. Subsidized competitors bore none of the costs of guarding against consumer disruptions and maintaining stability in those two transition periods. In neither case did the Commission issue any order to preserve unlawful unbundling schemes during the interim periods before new rules were put in place. During this current interim period following the third vacatur of the UNE rules, BellSouth and the other Bell companies have again made commitments to ensure an orderly transition. Just as the two previous transitions were successful without Commission orders, no Commission order is required here.

In addition to declining to perpetuate an unlawful UNE regime, the Commission should take affirmative steps to ensure that the D.C. Circuit's decision and new Commission rules are implemented quickly. In particular, the Commission should make it immediately clear that without an affirmative finding of impairment by the Commission, no network element will be available as a UNE, and that it would be inconsistent with federal law and policy for state commissions to act in a contrary manner. It should also provide clear guidance to the industry that without a Commission finding of impairment for a particular element in a particular market, no new UNE orders may be placed for that element after the end of this year regardless of existing contractual provisions.[5] At a minimum, it is clear that alternative transport and switching are available in many areas. As of January 1, 2005, switching and transport in areas where competition exists should be available only on the basis of a commercial agreement or tariff.

The Commission should also mandate that the time between now and the end of the year be used productively by the industry to prepare to quickly implement lawful unbundling rules rather than to perpetuate an unlawful scheme of maximum unbundling. To accomplish this, the Commission should require carriers to begin updating interconnection agreements now to incorporate provisions concerning the ordering of new UNEs, to provide for automatic incorporation of the forthcoming legitimate Commission UNE rules and to provide for an appropriate transition of the embedded base of previously unbundled elements. The change of law process for updating agreements can be subject to substantial delays that would be inconsistent with implementing a new, valid unbundling regime.[6] The Commission should require carriers to act quickly to incorporate these updates into their agreements as a matter of good faith bargaining, as it

[5] Given the circumstances, the Commission has the authority and duty to ensure that the transition to a new unbundling regime consistent with section 251(d) is accomplished quickly. Letter from Michael K. Kellogg on behalf of SBC Communications, Inc., BellSouth Corporation and Qwest Communications International Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338 and 98-147, (January 21, 2003).

[6] Many interconnection agreements to which BellSouth is a party require disputes over the change of law process to be filed with state commissions. There is no deadline for state commission action on these disputes.

has done in the past.[7] These updates should be incorporated into interconnection agreements within a time no longer than the periods set out in each contract's change of law provision. To the extent that legitimate disputes arise, the Commission should provide that if a state commission does not issue an order resolving the dispute within 3 months of filing, either party to the dispute may petition the Commission for resolution. This approach would help ensure that new rules can be implemented without further months of delay and litigation over updating interconnection agreements.

The Commission can best assist consumers and the economy by creating the strongest possible incentives for wireline companies to negotiate wholesale access solutions. That means that the Commission should not issue orders aimed at preserving a thoroughly discredited unbundling regime. Instead, the Commission should quickly implement a legal unbundling scheme so that the industry can better negotiate wholesale arrangements, and should also signal that whatever unbundling scheme it may choose to put in place, that scheme will terminate by the end of 2005, when cable VoIP will be broadly available throughout the country. Although the wireline industry is just one segment of this country's broadband future, it is a critical one, and the Commission should take prompt and affirmative steps to ensure that it is not handicapped by regulation that neither promotes real competition nor serves consumers.

Very truly yours,

Herschel L. Abbott, Jr.

HLA,Jr:kjw

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein

[7] When the Commission established national, default collocations intervals, it required ILECs to file tariff and SGAT amendments within 30 days (with the tariff amendments to take effect at the earliest time permissible under state law, and the SGAT amendments to take effect 60 days after filing). It also required prompt good faith renegotiation of agreements to reflect those intervals. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration and Second Fruther Notice of Proposed Rulemaking in CC Docket No. 98-147, 15 FCC Rcd 17806, ¶¶ 34-36 (2000).